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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 335

MERRILL L. NORTON, *Petitioner*,

v.

JACK CAMPBELL, Governor of the State of New Mexico; BRUCE KING, Speaker of the House of Representatives of the State of New Mexico; W. C. WHEATLEY, President or presiding officer *pro tempore* of the Senate of the State of New Mexico; *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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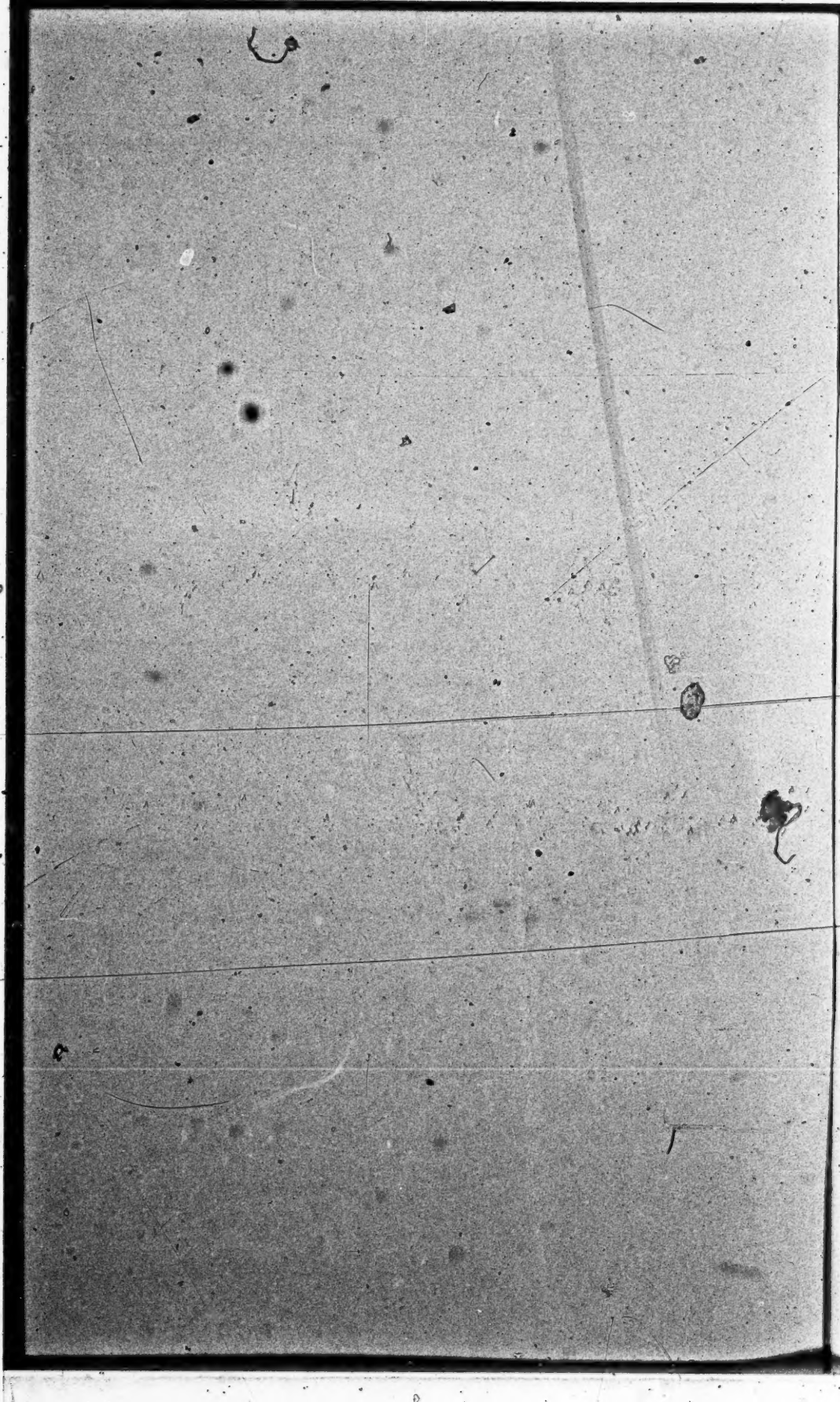

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IN THE

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No.

MERRILL L. NORTON, *Petitioner*,

v.

JACK CAMPBELL, Governor of the State of New Mexico; BRUCE KING, Speaker of the House of Representatives of the State of New Mexico; W. C. WHEATLEY, President or presiding officer *pro tempore* of the Senate of the State of New Mexico; *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MERRILL L. NORTON, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on May 6, 1966.

OPINIONS BELOW

The opinion of the district court (R. 14-16) is not reported. The opinion of the court below (Appendix A, *infra*, pp. A1-A7) is reported at 359 F. 2d 608.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, pp. A7-A8) was entered on May 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Article I, Section 2, of the Constitution of the United States permits a State to elect its Representatives in Congress on a virtually permanent at large basis, by failing to divide the State into congressional districts for nearly 25 years after becoming entitled to more than one Representative.

2. Whether, where a State entitled to more than one Representative in Congress has for nearly 25 years failed to divide the State into congressional districts, so that every Representative elected in 12 successive Congressional elections has come from one section of the State, a United States Court is required, in view of Article I, Section 2 of the Constitution of the United States, to grant relief looking to the effectuation of such a division.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and the Federal and State statutes involved are set forth in Appendix C, *infra*, pp. A8-A11.

STATEMENT

Although the State of New Mexico has been entitled to two Representatives in Congress since 1941 (Pl. Ex. 2, R. 32-33, 85), it has never been divided into Congressional districts (R. 26, 36, 38), no bill to that end introduced in

the State legislature since 1941 has ever passed (R. 34, 36, 38; Pl. Ex. 4, R. 34-35, 86; Pl. Ex. 5, R. 87-88), and from the election of 1942 down to the present time, through 12 successive Congressional elections, both New Mexico Congressmen have been elected at large (R. 26, 36, 39).

During that period, eight individuals have represented New Mexico in the House of Representatives, each of whom has come from the northern half of the State, as follows:

Congressman	City	County	When Elected
Clinton M. Anderson	Albuquerque	Bernalillo	1942, 1944
Antonio M. Fernandez	Santa Fe	Santa Fe	1942 through 1956, inclusive
Georgia L. Lusk	Santa Fe	Santa Fe	1946
John E. Miles	Santa Fe	Santa Fe	1948
John J. Dempsey	Santa Fe	Santa Fe	1950 through 1956, inclusive
Joseph M. Montoya	Santa Fe	Santa Fe	1957 through 1962, inclusive[1]
Thomas G. Morris	Tucumcari	Quay	1958 through 1964, inclusive
E. S. Johnny Walker	Santa Fe	Santa Fe	1964[2]

Although no New Mexico statute specifically requires election of Representatives at large, it has been the unvarying practice to do so since the first election at which the State became entitled to more than one (R. 26, 36, 39). In 1957 an absentee voting law prescribing the form of the "Official Absent Voter's Ballot" set forth the following entry (§ 3-14-20, N.M. Stat. 1953, Ann., added by Laws 1957, ch. 217, § 10; *infra*, pp. A10-A11):

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[1] Elected at special election, April 9, 1957, vice Antonio M. Fernandez, deceased, at which time his residence was at Pena Blanca in Sandoval County (R. 34, 86), which is adjacent to Santa Fe County, his present residence.

[2] Pl. Ex. 3, R. 33-34, R. 85-86; *New Mexico Blue Book, 1965-1966*, p. 42; *Congressional Directory*, 89th Cong., 2d sess., pp. 101-102.

"REPRESENTATIVES AT LARGE IN CONGRESS

"Write in the names of your choice for
"representatives at large

"Vote for two

_____
_____
_____
_____."

In 1959, the Legislature provided that the two Congressmen at large should be voted for by position places, as follows (§ 3-10-19.1, N.M. Stat. 1953, Ann., added by Laws 1959, ch. 71, § 1; *infra*, p. A10):

> **"3-10-19.1. Representatives in Congress—Nomination and election.**—In any primary, general or special election for United States representative, there shall be designated by the officer issuing the election proclamation as many places, consecutively numbered, as there are United States representatives to be elected and only one [1] United States representative shall be elected for each place designated. Each candidate upon filing his petition, or any convention called for nominating candidates, shall designate the position number for which he is a candidate and he shall be so designated on the ballot."

The foregoing provision is implemented in the prescribed form of tally book for election officials (§ 3-3-20, N.M. Stat. 1953, Ann., as amended through 1963; *infra*, pp. A9-A10) as follows:

"FOR REPRESENTATIVE IN CONGRESS

"Position 1 —— received (words and figures) —— votes
—— received (words and figures) —— votes
—— received (words and figures) —— votes

"Position 2 —— received (words and figures) —— votes
—— received (words and figures) —— votes
—— received (words and figures) —— votes"

The present action was brought by a resident and registered voter of Lovington, Lea County, in the southeast-

ern portion of the State, against the appropriate State officials, to obtain legislation, or in the alternative in the event of the Legislature's failure to act, seeking a decree, "dividing the State of New Mexico into two Congressional Districts, equal in population but giving heed to geographic considerations and the homogeneity of economic interests within said geographical divisions" (R. 3-4).

The gravamen of the action was set forth as follows in the complaint:

"That the purpose of Congressional districting was to establish electoral bodies of citizens having mutual and common interest geographically, economically, socially and politically; that such districting has been done by virtually all of the other States of the Union and that the time has now arisen when the plaintiff and the entire electorate of the State of New Mexico should enjoy their right to Congressional districting whereby there will be one Representative answerable to each district and its citizens and by means of which specific responsibility cannot be ignored * * *" (¶3, R. 4-5).

That since Representatives in other States are answerable to an average of 411,547 constituents while each New Mexico Representative at large is answerable to all 951,023, the total population of the State, "the electorate, citizens and residents of the State of New Mexico are thus deprived of their rights and privileges to be properly represented in the United States Congress by elected Representatives answerable to a specific Congressional District" (¶ 5, R. 5).

That the scheme of permanent representation at large conflicts with the doctrine of *Wesberry* v. *Sanders*, 376 U.S. 1, "in that it deprives the voters of certain localities with insufficient population of any representation whatsoever and thus discriminates in favor of large metropolitan centers and the inhabitants thereof" (¶7, R. 7).

Following the introduction of bills to district the State, and the consequent contention of the respondents that the case had therefore become moot (Ans., ¶2; R. 10), petitioner moved for a voluntary dismissal of the complaint without prejudice (R. 12-13). Thereafter, when the Attorney General insisted that the matter be determined on the merits pursuant to instructions from "the leadership * * * in both houses of the Legislature" (R. 80), petitioner was permitted to withdraw that motion and proceed (R. 29). Subsequently one of the districting bills passed one house of the Legislature, but was killed on reconsideration the following day.[3]

The proof showed that there were substantial economic and social differences between the northern and the southern portions of the State (R. 45-47, 52-53), and the plaintiff testified that he not only was required to share his vote with another district (R. 49), but also that, as a resident of the southern portion, he was improperly represented by the State's two Congressmen, who were under a greater burden than other members of Congress because of their geographically larger constituency (R. 51).[4]

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[3] The "Cargo bill," H.B. No. 20 (R. 11-12), passed the New Mexico House of Representatives on March 8, 1965, by a vote of 42-29. Thereafter, it was recalled from the Senate and on the following day it was killed in the House, 57-18. State legislative proceedings are of course well within the range of judicial notice. *Alaska* v. *American Can Co.*, 358 U.S. 224, 226-227.

[4] The districting proposed in the complaint (¶6, R. 6-7) was identical with that contained in the Runnels bill, one of the two introduced during the pendency of the present action (Pl. Ex. 5, R. 37-38, 87-88). The Cargo bill, *supra* note 3 (Ex. A, R. 11-12), would have placed McKinley and Harding Counties in District 2, thus reducing the population discrepancy between the two districts to 3,397, or only a .0035 deviation from the mean of 475,511; Cargo bill District 1, population 477,210; Cargo bill District 2, population 473,813. Petitioner conceded below (Br. 37) that the proposal in his complaint was merely a suggestion. Obviously the details of division do not become relevant until and unless it is determined that division of the State into districts is required.

The district court denied relief, in part on the ground that "it has no authority to district the State itself" (R. 15), but more specifically on the grounds (R. 26-27) that 2 U.S.C. § 2a (*infra*, pp. A8-A9) "permits and approves of the election of United States Representative at large," that petitioner is not the subject of discrimination since he has the same vote as every other person in the State, and that petitioner had failed to challenge § 3-10-19.1 (quoted *supra*, p. 4), "which provides that United States Representatives be elected at large by position number."

On appeal, the court below held (*infra*, p. A3) that, inasmuch as no injunctive relief was sought against the operation of the statute, no three-judge court was required.[5] It held further (*infra*, p. A4) that, "Since appellant seeks redress for the impairment or debasement of an alleged constitutionally protected voting right, the federal court is vested with jurisdiction to entertain the suit, and appellant undoubtedly has standing to maintain it."[6]

On the merits, the court below affirmed, saying (*infra*, p. 7), "We think the constitutional mandate is satisfied when representatives are chosen by the people of a district of substantially equal population as others or by all of the people of a state," and that "if, as we hold, appellant and those similarly situated are not constitutionally entitled to vote in a district within the state of New Mexico, he cannot complain of the fact that voters in most other states elect their representatives by districts."

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[5] Petitioner's position below (Br. 31-33) was that § 3-10-19.1 was primarily a statute concerning the mechanics of the election process rather than one either directing or authorizing elections at large, and that consequently there was neither any statute to set aside (cf. *Phillips* v. *United States*, 312 U.S. 246), nor was the result of which he complained directly attributable to a statute (*Ex parte Bransford*, 310 U.S. 354, 361).

[6] In view of the foregoing, we feel it unnecessary to argue either jurisdiction or standing in the present petition.

REASONS FOR GRANTING THE WRIT

This case, which presents the concept of constituency as a factor in and a constitutional requirement of Congressional representation, goes to the very heart of the Congressional election process.

First. We have here a variant of what this Court in *Fortson* v. *Dorsey,* 379 U.S. 433, 439, and again in *Burns* v. *Richardson,* 384 U.S. 73, 89, declared would constitute an invidious discrimination, namely, an apportionment which, "although made on a proper population basis, was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

Here the device of a multi-member constituency, namely, the persistent use over nearly 25 years of Congressional elections at large, has operated at least to minimize, and demonstrably to cancel out, the voting strength of the population in the southern half of the State of New Mexico. Here there is discrimination, in our view both invidious and impermissible, against a geographical element: As the table at page 3, *supra,* shows, no Congressman from the southern part of New Mexico has been elected in all that time.[7]

Second. The Congressional authorization for elections at large (2 U.S. C. § 2a(c), *infra,* pp. A8-A9; *Smiley* v. *Holm,* 285 U.S. 355; *Koenig* v. *Flynn,* 285 U.S. 375; *Carroll* v. *Becker,* 285 U.S. 380) deals with a narrow and special situation, one that arises only in the interim period between the assignment of a new quota to a districted State and

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[7] Such expressions as there are in support of partisan gerrymandering as permissible (*Bush* v. *Martin,* 251 F. Supp. 484, 513-515 (S.D. Tex.); *WMCA, Inc.* v. *Lomenzo,* 238 F. Supp. 916, 925-926 (S.D. N.Y.), affirmed, 382 U.S. 4, and see concurring opinion at 5-6), appear to us to give too little weight to *Fortson* v. *Dorsey,* and moreover all such expressions antedate the reiteration of its observations in the later case of *Burns* v. *Richardson.*

the enactment of redistricting legislation to accommodate the increase or decrease as the case may be.

Neither these decisions nor the statute itself, which speaks of "*re*districted" — our italics — deal with the virtually permanent at large situation involved here, where there has been a continuing failure ever to divide New Mexico into districts at any time since 1941, when it first became entitled to more than one Representative in Congress.

There may of course be difficulties in the redistricting process, as indeed there were until the principles of *Wesberry* v. *Sanders,* 376 U.S. 1, could be universally implemented. To take a recent notable example, Alabama lost one Representative in the 1960 census, then elected its quota on an at large basis in 1962 and 1964, and did not redistrict until 1965. See *Moore* v. *Moore,* 246 F. Supp. 578 (S.D. Ala.). Mindful of this Court's admonition (*Virginia* v. *West Virginia,* 222 U.S. 17, 19) that "a State cannot be expected to move with the celerity of a private business man," we would not even intimate that five years after a census, or perhaps even somewhat more, would constitute an unreasonable delay in redistricting.

We do assert, however, that failure to district at all, continuing Congressional representation at large for some 25 years, and that is the basis on which New Mexico has proceeded, is unreasonable, and denies this petitioner his rights under the Constitution. He and those similarly situated should not be required, in Chief Judge Cardozo's phrase, to await "postponement to the Greek Kalends." *Matter of People (Russian Reinsurance Co.),* 255 N.Y. 415, 422, 175 N.E. 114, 116.

Third. The evils of representation at large have been recognized over the years; it is without question the most effective method of denying any voice whatever to minorities who could elect some representatives if the cognizant area were districted, but who lack the numbers effectually to contend against the majority on an at large basis. See *Colegrove* v. *Green,* 328 U.S. 549, 553 (Frank-

furter, Reed, and Burton, JJ.), 565-566 (Rutledge, J.); *Maryland Citizens Comm. &c.* v. *Tawes*, 228 F. Supp. 956, 957 (D. Md.); *Calkins* v. *Hare*, 228 F. Supp. 824, 829 (E.D. Mich.) ("undesirable elections at large"); *Gong* v. *Bryant*, 230 F. Supp. 917, 920 (S.D. Fla.). As all those authorities indicate, the cure of elections at large is worse, or nearly so, than the disease of malapportionment that it was invoked to cure. Cf. Douglas, J., in *Fortson* v. *Dorsey*, 379 U.S. 433, 441-442.

Fourth. Our position is simply this, that permanent Congressional representation at large violates the Constitutional scheme quite as much as do unequal districts, and that just as the failure of Congress after 1929 to reenact the requirement for "districts * * * containing as nearly as practicable an equal number of inhabitants" (Sec. 3 of the Act of Aug. 8, 1911, c. 5, 37 Stat. 13, 14; 2 U.S.C. [1926 ed.] § 3; see *Wood* v. *Broom*, 287 U.S. 1) did not operate to prevent this Court in *Wesberry* v. *Sanders*, 376 U.S. 1, from enforcing that precise concept as a constitutional requirement, so such failure should similarly not defeat the right of an inhabitant of an area within a State that is unrepresented in fact by the operation of a long continued at large scheme from obtaining division of the State into districts.

Moreover, no controlling significance can be attached to the circumstance that bills affirmatively providing that all States must be districted have up to now failed of passage. This Court has frequently indicated the very slight weight that can be given to Congressional silence. *Helvering* v. *Hallock*, 309 U.S. 106, 119, 120; *Girouard* v. *United States*, 328 U.S. 61, 69-70; *Federal Trade Comm.* v. *Dean Foods Co.*, No. 970, last Term, decided June 13, 1966, pp. 10-14 of slip opinion. Accordingly, the failure up to now of H.R.

5505, 89th Congress, to pass both houses,[8] and, we assume for purposes of argument, of similar bills in earlier Congresses, cannot be deemed determinative.

We are of course aware that a number of district court decisions are in accord with the result reached below in holding at large Congressional elections to be proper.[9]

But if, to decide that question (*United States* v. *Classic*, 313 U.S. 299, 317-318), "we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes," then, without question, it can easily be demonstrated that the Founders contemplated that the people should be represented in the House of Representatives by members chosen from districts within each State, while the States as such—i.e., at large—should be represented in the Senate.

It would not be appropriate at this juncture either to marshal, much less to quote extensively from, the materials; we deem it sufficient simply to indicate that a representative group of those who influenced and drew and urged the ratification of the Constitution so expressed themselves. E.g., Montesquieu, *The Spirit of the Laws*, Book XI, chapter 6; *The Federalist*, No. 56 (Madison; see *Wesberry* v. *Sanders*, 376 U.S. at 15); 1 *Elliot's Debates* 360-361

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[8] Passed the House of Representatives on March 16, 1966, 111 Cong. Rec. 5080-5101; see H.R. Rep. No. 140, 89th Cong., 1st sess. As thus passed, this bill, which was designed to provide "Federal Standards for Congressional Redistricting," would have amended 2 U.S.C. § 2a(c), *infra*, pp. A8-A9, to require every State to be districted.

[9] *Calkins* v. *Hare*, 228 F. Supp. 824 (E.D. Mich.); *Moore* v. *Moore*, 229 F. Supp. 435, 439 (S.D. Ala.); *Park* v. *Faubus*, 238 F. Supp. 62, 66 (E.D. Ark.); cf. *Schaefer* v. *Thomson*, 251 F. Supp. 450, 453 (D. Wyo.) (state apportionment); *Yancey* v. *Faubus*, 251 F. Supp. 998, 1001 (E.D. Ark.) (same).

(Luther Martin of Maryland); 2 *id.* 228-230 (J. Smith of N.Y.); 2 *id.* 255 (Hamilton); 3 *id.* 14 (Nicholas of Va.); 3 *id.* 125 (Randolph of Va.); 4 *id.* 71 (Steele of N.C.); 4 *id.* 302-303 (C. C. Pinckney of S.C.). Indeed, Pinckney had made the same point in the Constitutional Convention itself (1 *Records of the Federal Convention* [Farrand ed., 1911] 358, 364, 367), and, more significantly, just before the final vote on the engrossed Constitution, the ratio of representation was unanimously changed from one for every 40,000 inhabitants to one for every 30,000. 2 *Records of the Federal Convention* 643-644; M. Farrand, *The Framing of the Constitution* (New Haven, 1913) 193-194. Even so, there were many expressions of discontent that the smaller number was still too large to be truly representative. 2 *Elliot's Debates* 228-230 (J. Smith of N.Y.); 2 *id.* 545 (Harrisburg, Pa., convention proposal for districts of 20,000); 2 *id.* 442, 530 (Wilson and McKean of Pa. answering objections to the 30,000 figure). And see Jefferson to Monroe, January 12, 1800, complaining of the at large system (9 *The Works of Thomas Jefferson* [P. L. Ford ed., 1905] 90-92).

It is true that at first five States elected by districts, four at large, and Connecticut on a mixed system; Delaware had only one Congressman, and neither Rhode Island nor North Carolina had ratified. L.F. Schmeckebier, *Congressional Apportionment* (Washington, 1941) 131. But by 1842, when Congress passed the first districting Act, 22 out of the 28 States with more than one Representative were districted, and by 1848 every multi-member State elected by districts, except only where there was a temporary failure to district following a reduction in the State's quota. *Id.*, 132, 136.

In short, after 60 years there was compliance with the Founders' intentions as expressed in the Constitution. Surely proper adherence to historical precepts requires the Court to implement their concept of constituency as the

basis of Congressional representation rather than to perpetuate and to legalize on a permanent basis the earlier deviations from the constitutional norm.

Fifth. Simply to show that it has not been overlooked, we note that there can be no doubt at this time of the power of a court of the United States to effectuate Congressional districting within a State whenever such action is constitutionally required. *Alton* v. *Tawes*, 384 U.S. 315, affirming, *per curiam*, 253 F. Supp. 731 (D. Md.).

CONCLUSION

The constitutional issue now presented is, very obviously, both substantial and important. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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JULY 1966.

APPENDIX A

OPINION BELOW

Filed May 6, 1966

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March 1966 Term

No. 8231

MERRILL L. NORTON, *Appellant*,

v.

JACK CAMPBELL, Governor of the State of New Mexico;

BRUCE KING, Speaker of the House of Representatives of the State of New Mexico;

W. C. WHEATLEY, President or presiding officer pro tempore of the Senate of the State of New Mexico;

HAROLD RUNNELS, State Senator from Lea County, New Mexico; and

FINIS HEIDEL, State Representative from District 1, Lea County, New Mexico, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BARTON L. INGRAHAM for Appellant.

MYLES E. FLINT (Boston E. Witt, Attorney General, with him on brief) for Appellees.

Before MURRAH, Chief Judge, LEWIS and BREITENSTEIN, Circuit Judges.

MURRAH, Chief Judge.

This is an appeal by Norton, a New Mexico citizen and registered voter, from a judgment dismissing his suit for a declaration that the practice of electing two United

States Representatives by statewide elections is unconstitutional and for an order dividing the state into two congressional districts unless the New Mexico legislature does so.

Since 1941 the State of New Mexico has been entitled to elect two members of the House of Representatives. The state has never been divided into districts and from the beginning the election officials have followed the practice of providing for the nomination and election of the two Congressmen by designation to numbered positions. The practice was codified in 1959.[1] In the exercise of its supervisory powers under Article I, Section 4 of the Constitution,[2] Congress since 1929 has pertinently provided that until a state is redistricted after any apportionment, the representatives to which the state is entitled shall be elected in the following manner: "* * * (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such state; * * *" 2 USC 2a(c).

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[1] New Mexico Statutes Annotated, 3-10-19.1, provides: "In any primary, general or special election for United States representative, there shall be designated by the officer issuing the election proclamation as many places, consecutively numbered, as there are United States representatives to be elected and only one [1] United States representative shall be elected for each place designated. Each candidate upon filing his petition, or any convention called for nominating candidates, shall designate the position number for which he is a candidate and he shall be so designated on the ballot."

[2] Article I, Section 4 of the United States Constitution provides in pertinent part that "The Times, Places and Manner of holding Elections for * * * Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations * * *."

The appellant does not attack the state statute, but says that it is inapplicable to the New Mexico situation. The trial court held that the federal Act did "permit and approve" elections at large. While the federal statute may have contemplated redistricting after any apportionment, we do not think it should be construed to prohibit elections at large, i.e. see Article I, § 4. Appellant also pretends not to attack the state statute; but as the trial court observed, the court could not grant the relief sought without invalidating its provisions, and we take appellant's case as necessarily drawing into issue the constitutionality of the state act.

In the trial court, after the issues were drawn and apparently during the course of the proceedings, the state suggested that since the constitutionality of the state statute was in issue the case was appropriate for a three-judge court under 18 U.S.C. 2281. But, inasmuch as no injunctive relief is sought against the operation of the statute, we do not think a three-judge court was required. See Smith v. Wilson, 273 U.S. 388; Farmers' Gin Co. v. Hayes, 54 F. Supp. 43; Benoit v. Gardner, 351 F. 2d 846; United States v. Commonwealth of Pennsylvania, 214 F. Supp. 913; and see generally Florida Lime and Avocado Growers, Inc., et al. v. Jacobsen, 362 U.S. 73; Swift & Co., Inc. et al. v. Wickham, Commissioner of Agriculture & Markets of New York, 382 U.S. 111.

The trial court seemed to think that the asserted grievance was not justiciable, and Mr. Justice Frankfurter in Colegrove v. Green, 328 U.S. 549, thought the method and manner of electing members of the House of Representatives within a state was a political matter which could not be made a justiciable issue in the courts. But, Baker v. Carr, 369 U.S. 186, and Westberry v. Sanders, 376 U.S. 1, left no doubt that the asserted deprivation, impairment or debasement of voting rights within a state is justiciable and remedial in the courts upon petition by those whose votes are

debased or diluted by state action. Since appellant seeks redress for the impairment or debasement of an alleged constitutionally protected voting right, the federal court is vested with jurisdiction to entertain the suit, and appellant undoubtedly has standing to maintain it.

The constitutional argument is to the effect that Article I, Section 2 of the Constitution providing that the "House of Representatives shall be * * * chosen * * * by the people of the several states * * *" should be construed in its historical context to require division of the state of New Mexico into two districts of equal population having common geographical, economical and political interests; that in no other way can the manifest intendment of the framers of the Constitution be effectuated. A further argument is to the effect that at large elections in a state entitled to more than one Congressman works an abridgement of the privileges and immunities clause of Section 1 of the Fourteenth Amendment because Congressional districting prevails in 42 of the 50 states and most voters for the House of Representatives are members of less populous and smaller constituencies than appellant and those similarly situated in New Mexico.

It is appellant's contention that the historical analysis utilized in Westberry v. Sanders, supra, to construe the mandate in Article I, Section 2, that the House of Representatives shall be "chosen * * * by the people of the several states" to mean that Congressional districts within a state must be of substantially equal population is equally applicable here to prohibit any state from electing more than one representative at large and to require the state legislature to divide the state into districts of substantially equal population. Appellant does not rely upon the "one man—one vote" principle in Westberry and other apportionment cases as authority for his contention. The argument is rather to the effect that whereas Westberry announced a "constitutional concept of equality" between

voters, this court should by the same parity of reasoning and based on the same historical analysis expound a new "concept of constituency", i.e. districts composed of bodies of persons "with common views, interests and often from a common locale from whose midst is chosen a delegate to represent them in [a Congress] made up of representatives of groups from different locales and with different views and interests."

It is true, as appellant suggests, the architects of Article I, Section 2, contemplated that the House of Representatives would be chosen by the people from districts within a state rather than at large, i.e. see Mr. Justice Frankfurter in Colegrove v. Green, supra, 553, quoting from 1 Kent Commentaries (12th ed., 1873) 230, 231; see also Mr. Justice Black in Westberry v. Sanders, supra, quoting from "The Federalist", No. 56, footnotes 39, 40, p. 15, footnote 45, p. 16.

Judge Choate in Gong v. Bryant, 230 F. Supp. 917 was of the view that constitutional sources clearly indicated that "district representation in Congress was the deliberate choice and intent of our founding fathers." And, "the concept of district representation seems to have more historical substance to commend it than even the new rule of mathematical equality within districts." But, Judge Choate cautiously refrained from requiring the legislature to divide the state of Florida into districts in obedience to the recognized historical intendment. Other courts dealing with the problem of redistricting in accordance with the Westberry mandate either expressed the view or assumed that Congressional elections at large within a state were constitutionally permissible. See Park v. Faubus, 238 F. Supp. 62; Moore v. Moore, 229 F. Supp. 435. The appellant here seems to be the first to contend that Article I, Section 2, is a mandate to state legislatures and to the the Congress to provide for election of representatives by districts.

The careful analyses found both in Colegrove v. Green, supra, and Westberry v. Sanders, supra, show that for the first fifty years of our national existence and until 1842 elections of Congressmen at large within the states was "wide-spread". It was not until then that Congress for the first time exercised its supervisory powers under Article 1, Section 4 to provide for the election of representatives by districts within a state, and as Mr. Justice Frankfurter observes in Colegrove, "* * * strangely enough, the power to do so was seriously questioned. Id. 555. Thereafter and until 1929, Congress did from time to time provide for elections by districts within a state.

No one contends here that anything said in Westberry prohibits the people of a state from choosing their representatives at large. Indeed, after announcing the principle of equal representation for an equal number of people, Mr. Justice Black observed that "This rule is followed automatically, of course, when representatives are chosen as a group on a statewide basis as was a widespread practice in the first fifty years of our nation's history." Mr. Justice Harlan in dissent construed the majority as holding that "the Constitution requires states to select representatives either by elections at large or by elections in districts composed 'as nearly as practical' of equal population * * *". Id. 20. In Smiley v. Holm, 285 U.S. 355, 374, Mr. Chief Justice Hughes expressed the view of the court that under Article I, Section 2, the additional representatives allotted to a state under the Apportionment Act could "properly be elected by the state at large".

Aside from the statements of some of the framers of the Constitution concerning the desirability of electing representatives from districts within a state with power in the state and Congress to so require, i.e., see Article I, Section 4, we can find nothing in the historical analysis to indicate that anyone entertained the belief that the Constitution

required it as a means, manner or method of insuring the election of the members of Congress "by the people".

Even though the election of members of the House of Representatives by districts within the state may be desirable and indeed historically contemplated by the framers of the Constitution, we cannot read into the command that they "shall be * * * chosen * * * by the people" an implied constitutional obligation binding on the states that they must be chosen by the people of a district within a state which is representative of local interests, social, ideological, political or otherwise. We think the constitutional mandate is satisfied when representatives are chosen by the people of a district of substantially equal population as others or by all of the people of a state.

What we have said here is also completely dispositive of the appellant's contention that the at large elections in New Mexico deprive him of his privileges and immunities as a national citizen. There is no contention that New Mexico is malapportioned among the states, and if, as we hold, appellant and those similarly situated are not constitutionally entitled to vote in a district within the state of New Mexico, he cannot complain of the fact that voters in most other states elect their representatives by districts.

The judgment is affirmed.

APPENDIX B

JUDGMENT BELOW

JUDGMENT

Thirty-Seventh Day, March Term, Friday, May 6th, 1966.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The pertinent portion of Article I, Section 2, of the Constitution of the United States is as follows:

> "Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

2. The pertinent portion of Article I, Section 4, of the Constitution of the United States is as follows:

> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators."

3. The pertinent portion of 2 U.S.C. § 2a, as amended through 1941, is as follows:

> "§ 2a. Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk
>
> • • • • •

"(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large."

4. Section 3-3-20, New Mexico Statutes 1953, Annotated, as amended through 1963, provides in pertinent part as follows:

"3-3-20. Poll books and tally books—Preparation and form.—

* * * * *

SUBSECTION B—THE TALLY BOOK

* * * * *

"FOR REPRESENTATIVE IN CONGRESS

"Position 1 —— received (words and figures) —— votes
—— received (words and figures) —— votes
—— received (words and figures) —— votes

"Position 2 —— received (words and figures) —— votes
—— received (words and figures) —— votes
—— received (words and figures) —— votes"

5. Section 3-10-19.1, New Mexico Statutes 1953, Annotated, added by Laws 1959, ch. 71, § 1, provides as follows:

"3-10-19.1. **Representatives in Congress—Nomination and election.**—In any primary, general or special election for United States representative, there shall be designated by the officer issuing the election proclamation as many places, consecutively numbered, as there are United States representatives to be elected and only one [1] United States representative shall be elected for each place designated. Each candidate upon filing his petition, or any convention called for nominating candidates, shall designate the position number for which he is a candidate and he shall be so designated on the ballot."

6. Section 3-14-20, New Mexico Statutes 1953, Annotated, added by Laws 1957, ch. 217, § 10, provides as follows:

"3-14-20. **Form of ballot.**—The secretary of state shall acquire for use of voting in elections under this act [3-14-11 to 3-14-32] an adequate number of absent voter's ballots. Each ballot shall be printed in sub-

stantially the following form insofar as the offices enumerated are appropriate to the particular election:

"OFFICIAL ABSENT VOTER'S BALLOT

* * * * *

"REPRESENTATIVES AT LARGE IN CONGRESS

"Write in the names of your choice for

"representatives at large

"Vote for two

_____

_____

_____

_____."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 385

MERRILL L. NORTON, *Petitioner,*

v.

JACK M. CAMPBELL, Governor of the State of New Mexico; BRUCE KING, Speaker of the House of Representatives of the State of New Mexico; W. C. WHEATLEY, President or presiding officer pro tempore of the Senate of the State of New Mexico; HAROLD RUNNELS, State Senator from Lea County, New Mexico; and FINIS HEIDEL, State Representative from District 1, Lea County, New Mexico,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE TENTH CIRCUIT

Respondents herein pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit from a judgment entered in the above-entitled cause on May 6, 1966 be denied.

QUESTIONS PRESENTED

1. Does Article I, Section 2, of the Constitution of the United States require a State, which is entitled to more than one Representative in Congress, to elect those Representatives from Congressional Districts?

2. Whether, where a State entitled to more than one representative has failed to divide the State into Congressional Districts, a United States Court is required, in view of Article I, Section 2 of the Constitution of the United States, to grant relief looking to the effectuation of such a division.

STATEMENT

Respondents do not wish to supplement the Statement of the Case presented by Petitioner, but do wish to make several corrections therein, for the sake of accuracy. As Respondents understand Rule 40 (I), of the Rules of the Supreme Court, the statement of the case should not be used for purposes of argument but only for purposes of presenting facts necessary to a determination.

As may be noted, Respondents restated the questions presented by the Petitioner in order to delete certain matters which are immaterial and irrelevant to the question Petitioner seeks to present to the Court. In order that the Statement of Facts not be cluttered Respondent would suggest that alleged facts concerning the residences of various members of the New Mexico Congressional delegation (Petition for Writ of Certiorari, page 3) and economic and social facts about New Mexico (Petition for Writ of Certiorari, page 6) are unnecessary to a determination of the questions presented.

Respondents also wish to make it clear that the quotation purportedly stating the doctrine of *Wesberry* v. *Carr*, 376 U.S. 1 (Petition for Writ of Certiorari, page 5) is Petitioner's interpretation of the doctrine announced in that case. It is Respondents' contention that *Wesberry* v. *Carr, supra,* does not support the statement of Petitioner.

REASONS FOR DENYING THE WRIT

Respondents respectfully submit that a brief analysis of the questions raised herein, in the light of the pertinent law, will make the answers so clear as to make further argument and briefs on the points unnecessary and will illustrate the correctness of the decision of the Court below.

First. It should be made clear that the issues presented by the Petition, and throughout the course of the proceedings below, did not and do not involve the merits of districting over at-large elections. The fact that one method better stands the tests of reason and may more closely conform to certain standards of fairness is immaterial. As the issue involved here does not concern the merits of districting, Petitioner's third point (Petition for Writ of Certiorari, pages 9 and 10) is immaterial to this cause. The issue presented is whether the Constitution requires districting.

Second. Article I, Section 2, of the Constitution of the United States, in pertinent part, is as follows:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

It does not mention "districts" or "districting", let alone requiring the same. It does, as the Court found, include a requirement of "one man equals one vote". *Wesberry* v. *Carr*, 376 U.S. 1. It is Respondents' contention that when the above section is read in conjunction with Article I, Section 4, of the Constitution of the United States, it is apparent that such a directive with regard to districting was not contemplated. Article I, Section 4 is as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

It appears from the above language that it was and is contemplated that "Times, Places and Manner of holding Elections" is initially a matter left to the States, with a proviso added that when they act, they act in a manner consistent with the directives contained in other sections of the Constitution. It is further provided that Congress may enact legislation which would supersede that of the States. It seems apparent that matters such as districting would be included among those problems which were delegated specifically to the States and Congress. As that problem was delegated the Constitution is silent with regard to it. No further comment was necessary.

Third. While New Mexico has no specific legislation directing that elections for Congressional Representatives on an at-large basis, there are State laws which of necessity require that procedure. Section 3-10-19.1, N.M.S.A., 1953 Compilation (P.S.) provides:

"In any primary, general or special election for United States representative, there shall be designated by the officer issuing the election proclamation as many places, consecutively numbered, as there are United States representatives to be elected and only one United States representative shall be elected for each place designated. Each candidate upon filing his petition, or any convention called for nominating candidates, shall designate the position number for which he is a candidate and he shall be so designated on the ballot."

Section 3-3-20, N.M.S.A., 1953 Compilation (P.S.) in pertinent part provides:

"FOR REPRESENTATIVE IN CONGRESS

Position 1 — received (word and figures) — votes
———————received (word and figures) — votes
———————received (word and figures) — votes
Position 2 — received (word and figures) — votes
———————received (word and figures) — votes
———————received (word and figures) — votes."

Section 3-14-20, N.M.S.A., 1953 Compilation (P.S.) in pertinent part provides on absentee ballots as follows:

"REPRESENTATIVES AT LARGE IN CONGRESS

Write in the names of your choice for representatives at large

Vote for two

_____

_____

_____

_____."

Certainly these sections which were enacted by the State Legislature, as contemplated by Article 1, Section

4, of the Constitution, *supra,* require that elections in New Mexico, be held on an at-large basis. In order to prevail in this action Petition must, of necessity, attack the constitutionality of such legislation. However, as the Court below pointed out, Petitioner "pretends" not to attack these enactments because he states that they do not control.

Fourth. Congress has enacted legislation which clearly indicates at-large elections are permissible. 2 U.S.C. 2a (c) provides:

> "(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) *if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State;* (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased num-

ber of Representatives, they shall be elected from the State at large." (Emphasis added).

That portion emphasized above certainly does not indicate a prohibition of at-large elections. While it deals with redistricting, it is applicable to this fact situation.

Fifth. In this instance historical analysis such as that used by the Court in *Wesberry* v. *Carr,* 376 U.S. 1, does not assist Petitioner's cause. Undoubtedly, districting was discussed by persons drafting the Constitution. This fact is not disputed. The question is whether or not those drafting that document intended by the use of the language "shall be . . . chosen . . . by the people" to require elections by districting.

As discussed in the first point, above, matters such as districting were delegated to the States and Congress. The most reasonable reading of the Constitution leads to this conclusion. To construe the language, as Petitioner seeks to interpret it, is not in accord with the clear and simple language used. Had such an intent and effect been desired, it would have been easy to to draft language so stating. It was not done. It was not intended. Historical analysis, rather than indicating that the Constitution required districting, indicates only that districting would be desirable. No language in the Constitution *requires* districting.

Petitioner attempts to cite actual experience under the Constitution in support of his cause. (Petition for Writ of Certiorari, page 12). If anything, that history indicates, as Respondents contend, that the matter of districting is properly one for the States and Congress. As pointed out by Justice Frankfurter in *Colegrove* v. *Green,* 328 U.S. 549 at pp. 555-556, until

1842 there was a great diversity of methods used to elect representatives. Only when Congress acted at that time, were elections from districts required. Certainly the fact that elections from districts were require by Congressional enactments in 1842, cannot be used to support Petitioner's contention with regard to what the Constitution requires. Such *ex post facto* reasoning, while clear, is nevertheless patently invalid.

Sixth. Petitioner asserts in his Petition (Petition for Writ of Certiorari, p. 8) that the situation placed before the Court here is similar to that presented in *Fortson* v. *Dorsey,* 379 U.S. 433 and *Burns* v. *Richardson,* 384 U.S. 73. *Fortson* v. *Dorsey, supra,* involved the issue of whether multi-district counties violated the residents of such districts the right to equal voting power. This Court held that such an arrangement was valid. Essentially, the same arrangement is attacked by Petitioner herein, only on a Congressional rather than State level. The case does support Petitioner's contention. *Burns* v. *Richardson, supra,* too raised the issue as to the validity of multi-member legislative districts. Again the decision of this Court was that such a plan was valid. Although it was stated that such districts might possibly effect an invidious discrimination such could be proven only by *clear evidence* of record. Applying that test to the instant record, it is apparent that there is no clear evidence to support Petitioner's contentions. The only *purported* evidence alleged in Petitioner's statement that the Southern portion of the State has been neglected. *No evidence* was introduced in support of that statement. *Burns* v. *Richardson, supra,* does not aid Petitioner.

Seventh. Respondents submit that in view of the answer to the first question, no consideration of the second question is necessary.

CONCLUSION

Petitioner's questions have been presented. Respondents contend that the answers to those questions are clear and that the decision of the Court below is proper in all respects. Therefore, Respondents respectfully submit that any further consideration of the issues is unnecessary and that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorney General

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Assistant Attorney General

Attorneys for Respondents.